

**Attachment 1.**

**Comments of Brand & Frulla, P.C.**

# BRAND & FRULLA

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April 15, 2004

## VIA ELECTRONIC MAIL

Dr. James W. Balsiger  
Alaska Regional Administrator  
National Marine Fisheries Service  
P.O. Box 21668  
Juneau, Alaska 99802-1668

**Re: Draft Environmental Impact Statement on Essential Fish Habitat  
Identification and Conservation in Alaska**

Dear Dr. Balsiger:

On behalf of the Marine Conservation Alliance ("MCA"),<sup>1</sup> we are writing in response to the National Marine Fisheries Service ("NMFS") call for comments in relation to the Draft Environmental Impact Statement on Essential Fish Habitat Identification and Conservation in Alaska ("Draft EIS"). These comments focus on the legal and regulatory requirements governing the identification and protection of essential fish habitat ("EFH") under the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), with particular attention to recent court decisions interpreting these requirements. These comments build on, and incorporate, the attached June 3, 2003, letter to the North Pacific Management Council ("NPFMC") submitted by Brand & Frulla during the development of the Draft EIS.

In summary, the EFH provisions of the MSA (16 U.S.C. § 1853(a)(7)) do not require the protection of benthic habitat for its own sake. The mandate to protect EFH to the extent practicable is not a general command to protect habitat per se, but rather a

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<sup>1</sup> MCA members, as you are likely aware, include fishing associations, coastal communities, Community Development Quota groups, harvesters, processors, support sector businesses, and consumers. The MCA is dedicated to promoting the sustainable use of North Pacific marine resources by present and future generations, based on sound science, prudent management, and a transparent, open public process. The MCA seeks practical solutions to resource use questions that protect both the marine environment and North Pacific fishing communities. The MCA also supports research and public education about the fishery resources of the North Pacific.

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utilitarian principle that habitat which is essential to **managed species** in some concrete sense be protected from adverse impacts from fishing and other sources. It flows from this that a determination that a fishery or fisheries do or do not have an adverse impact on the EFH of one or several managed species has legal implications for NMFS and the council developing the FMP or amendment.

Under the MSA, it is the finding of adverse impacts from fishing that triggers the duty to minimize those impacts "to the extent practicable." Conversely, where no adverse impacts from fishing on EFH are determined to exist, then no duty to mitigate those impacts ensues. Indeed, it would be difficult to justify the relative costs of EFH protection measures in situations where fishing is determined to have no long-term and more than minimal impacts on such EFH. As will be explained below, it is very unlikely that, in the absence of an "adverse impact" finding, a court would find the most draconian of EFH protection measures – *i.e.*, fishery closures – to be "practicable" within the terms of the MSA. This is in no small part due to the fact that NMFS's EFH regulations require a higher standard of "significant impacts" in order to justify closure of fishing grounds to some or all gear.

Finally, the applicable legal authorities distinguish the situation in which such determinations of adverse impacts on EFH can be made from perhaps the more common situation where the information is simply not sufficient to make a determination. In the latter case, courts have found that NMFS may have the discretion to meet the EFH requirement by either committing resources to studying the effects of fishing on EFH or relying on existing measures to satisfy the requirement. However, any measure that is specifically designed to mitigate the "unknown" impact on EFH must still be determined to be "practicable" in the sense that it provides more benefits than costs. And in the absence of such knowledge about the relationship between fishing and impacts on habitat, it is not likely that closures could be found practicable for the same reasons stated above.

The MCA fully supports the ultimate goal of protecting EFH through measures that are shown to be practicable in the sense that the benefit of such restrictions can be credibly shown to insure the productivity of managed stocks. However, the finding in the Draft EIS that options to permanently close large areas of productive ocean bottom solely to protect habitat are "practicable" in face of the determination that no adverse effects from fishing exist is quite objectionable. Such a finding neither comports with the legal and regulatory scheme governing the EFH requirements, nor with court determinations on this issue.

We would like to briefly expand on these points below.

### I. **EFH Requirements in the Statutory Scheme of the MSA**

As an initial matter, the EFH requirement is a component of the MSA section that

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deals with promulgating and amending FMPs. That is to say, EFH protection is not an overarching "National Standard" which applies to all regulatory actions promulgated under that Act.<sup>2</sup> When the Sustainable Fisheries Act of 1996 ("SFA") was enacted to amend the MSA by including the EFH requirements, Congress did not, as it did with bycatch reduction, protection of fishing dependent communities, and promotion of the safety of human life at sea, choose to raise EFH protection to the heightened level of a National Standard. See 16 U.S.C. §§ 1851(a)(8)-(10). As such, regulatory actions to protect EFH, such as those currently under consideration, must conform to these standards, as well as the requirement that measures achieve optimum yield on an ongoing basis (National Standard 1) and be based on the best scientific information available (National Standard 2). *Id.* §§ 1851(a)(1)-(2).

Furthermore, as an element of an FMP, the EFH provision applies only to species managed under the Act. As stated: "Any [FMP] . . . shall . . . describe and identify essential fish habitat for **the fishery** . . . , minimize to the extent practicable adverse effects caused by fishing, and identify other actions to encourage the conservation and enhancement of **such habitat**." 16 U.S.C. § 1853(a)(7) (emphasis added). "The fishery" refers to the one for which the plan is being developed, and "such habitat" is that EFH described and identified for that particular fishery.<sup>3</sup> This point is reinforced by the implementing regulations. See, e.g., 50 C.F.R. § 600.815(a)(1)(i) ("FMPs must describe and identify EFH in text that clearly states the habitats or habitat types determined to be EFH for each life stage of the managed species." ) (emphasis added). In other words, the EFH provisions of the MSA do not mandate protection for habitat of species that are not managed under the Act. Cf. 67 Fed. Reg. 2343 (Jan. 17, 2002) (EFH Final Rule) ("EFH cannot be designated for non-managed prey species, so a list of such species is not directly relevant to the rule.").

Finally, the statutory definition of EFH, *i.e.*, habitat that is "**necessary** to fish for spawning, breeding, feeding or growth to maturity," *id.* § 1802(10) (emphasis added), and the implementing regulations demonstrate that detailed information on the association between managed stocks and their habitat is vital to implementing EFH

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<sup>2</sup> See *Conservation Law Foundation v. Evans*, 229 F. Supp. 29, 34 n.11 (D. Mass. 2002), *aff'd* 360 F.3d 21 (1<sup>st</sup> Cir. 2004) ("Defendants also argue, accurately I believe, that § 1853(a)(7) applies only to the formulation of a Fishery Management Plan and not to framework adjustments to a plan already in place."). By contrast, all actions such as annual specifications or framework actions must comply with the ten National Standards for fisheries management.

<sup>3</sup> In turn, a "fishery" is defined as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics." 16 U.S.C. § 1802(13)(A).

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protection measures. See, e.g., C.F.R. §§ 600.815(a)(1)(i)-(ii) (detailing the type and levels of information needed to manage EFH). Such detailed information is particularly important when the "ultimate" tool of closures to some or all fishing gear as a means to protect EFH are being contemplated because of the potential for dramatic impacts on fishery participants and fishing dependent communities.

## II. Findings of No Adverse Effects and the Practicability Requirement

As stated above, the MSA requires only that **adverse effects** caused by fishing be minimized, and then only to the extent practicable. Adverse effects are defined as "any impact that reduces quality and/or quantity of EFH," 50 C.F.R. § 600.810(a), that is "more than minimal and not temporary in nature." *Id.* § 600.815(a)(2)(ii). When such impacts exist, the law requires NMFS to either identify new steps, which, subject to "practicability" analysis, will minimize the adverse effects on EFH or explain how past actions achieve this goal. *Id.* New actions or measures must be shown to be "necessary **and** practicable." *Id.* (emphasis added). The regulations specify a range of such options, including fishing equipment restrictions, time/area closures, and harvest limits. *Id.*

However, "prohibitions on fishing activities," according to the EFH regulations, are reserved for those "fishing activities that cause **significant damage** to EFH." *Id.* § 600.815(a)(2)(iv)(A) (emphasis added).<sup>4</sup> This is a higher standard than merely showing that an adverse effect exists. Thus, the regulations impose stringent requirements on levels of information and evidence of impacts required to support use of these draconian measures.

This is appropriate because the "practicability" requirement was added to the EFH provision of the SFA to ease the regulatory burden on the fishing industry. Rep. Billy Tauzin of Louisiana introduced an amendment while a predecessor SFA bill was in committee that (1) moved the EFH requirement from § 1853(a) (mandatory elements of FMPs) to subsection (b) (discretionary elements), and (2) added the language "to the extent practicable" as a qualifier on the amount of protection EFH should be given vis-à-vis the overriding goal of obtaining optimal yield, not to mention the impacts on fishermen and their communities. See H.R. Report 104-171, at 24 (1995).<sup>5</sup> Thus the

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<sup>4</sup> Indeed, the immediate next subsection of the NMFS EFH regulations explain that more or less permanent closures are reserved only for "certain vulnerable or rare areas/species/life stages" that might qualify as "habitat areas of particular concern," *id.* § 600.815(a)(2)(iv)(B), thus further raising the bar as far as declaring various fishing grounds off limits for habitat reasons.

<sup>5</sup> The final provision reads: "[E]stablish conservation and management measures necessary to minimize, to the extent practicable, adverse impacts on essential fishery habitat described in the plan under subsection (a)(7) caused by fishing." The Senate

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statutory practicability language is a limitation on the extent of the duty to minimize impacts, while a finding of "adverse effects" on EFH serves as a necessary precondition to undertaking the mitigation and practicability analysis at all.

NMFS's implementing regulations explain the basic calculus to employ in a practicability determination.<sup>6</sup> The regulations call for a balancing of costs and benefits of measures, sensibly weighted by the "nature and extent of the adverse effect on EFH." 50 C.F.R. § 600.815(a)(2)(iii). These regulations recognize that managing EFH will impose costs on "associated fisheries." *Id.* The regulations also mandate, in accordance with the MSA, that the benefits and costs to the nation be tallied, and that benefits of a particular mitigation measure outweigh its costs if it is to be considered practicable. *Id.* In terms of the "benefits" of measures to protect a managed species' EFH, it is clear from the discussion of the purposes of the Act above, that these must be tied to the MSA's ultimate goal of having sustainable fisheries, which produce optimal yield on an on-going basis, so that they will continue to "contribute to the food supply, economy, and health of the Nation . . . ." 16 U.S.C. § 1801(a)(1).

The practicability requirement is designed specifically to insure that certain economic harm and reductions in the ability to harvest optimal yield from a fishery are not blithely foregone in a trade for speculative benefits to habitat. Costs and benefits must be weighed as precisely as possible, and if the cost of a particular measure is certain to be high (such as taking productive fishing grounds out of the fishery or mandating that vessels switch gear), and the benefits uncertain in light of the best scientific information, that measure is **not** practicable within the meaning of the law.<sup>7</sup>

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("Continued")

version of the bill put the EFH requirement into the mandatory provisions section where it remained in the final, reconciled bill. However, the practicability language remained.

<sup>6</sup> See 50 C.F.R. § 600.815(a)(2)(iii) ("In determining whether it is practicable to minimize an adverse effect from fishing, Councils should consider the nature and extent of the adverse effect on EFH and the long and short-term costs and benefits of potential management measures to EFH, associated fisheries, and the nation, consistent with national standard 7. In determining whether management measures are practicable, Councils are not required to perform a formal cost/benefit analysis.")

<sup>7</sup> In the one legal interpretation of the practicability standard, the Court of Appeals for the First Circuit has clearly said that "practicable" does not equate to "possible." *Conservation Law Foundation v. Evans*, 360 F.3d 21, 28 (1<sup>st</sup> Cir. 2004). This was in response to plaintiff environmental groups' assertion that the phrase "to the extent practicable" was an "action forcing" requirement that councils and NMFS do anything possible to protect EFH, with costs being secondary.

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Consistent with the foregoing, the final EFH rule preamble states:

Such action [to minimize adverse fishing effects on EFH] is warranted to regulate fishing activities that reduce the capacity of EFH to support managed species, not fishing activities that result in inconsequential changes to habitat. In response to commenters' concerns over the word "identifiable" in the interim final rule, NMFS modified this section to read, "Councils must act to prevent, mitigate, or minimize any adverse effects from fishing, to the extent practicable, if there is evidence that a fishing activity adversely affects EFH in a manner that is more than minimal and not temporary in nature" based on the Councils' evaluation of the potential adverse effects of fishing. Temporary impacts are those that are limited in duration and that allow the particular environment to recover without measurable impact. Minimal impacts are insignificant changes to ecological functions.

67 Fed. Reg. at 2354 (emphasis added). Under this NMFS formulation, if NMFS and the NPFMC find, as they have so found in the Draft EIS, that there are no adverse impacts from fishing, then no mitigation measures are "warranted" because the demonstrated changes to habitat are "inconsequential." Furthermore, under such circumstances, a practicability determination is virtually impossible as there are no identifiable benefits to weigh against the costs associated with the mitigation measure.

At least one court, moreover, has held that absent scientific evidence of "adverse impacts" from trawling, closing a fishery to bottom tending gear in order to protect habitat runs afoul of National Standard 2 (requiring that measures be based on the "best scientific information available"). *Hadaja, Inc. v. Evans*, 263 F. Supp.2d 346, 356 (D.R.I. 2003). While this case involved a prohibition on the use of trawl gear in a fishery as opposed to a habitat closure *per se* (although one of the reasons advanced was that it was necessary to protect EFH of the managed species), in that case the council was uncertain as to whether there was an adverse impact on EFH and the judge still found the closure to violate the law.

In the case of the instant Draft EIS, the finding is one of **no** adverse impact by any of the fishing gears in the management units. Draft EIS at 4-388, § 4.5.3.1.1<sup>8</sup> (stating that "current fishing activities affect EFH in a manner that is minimal and temporary in nature"). In the face of such a definitive finding, it appears that if any of the habitat closure options were chosen they could be found to be in violation of the MSA under the authority of *Hadaja*, cited above. It would be equally difficult to support a finding that any such measures are practicable within the meaning of the law when their

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<sup>8</sup> In case there are any differences from the page numbering in the paper version of the Draft EIS it should be noted that the citations here are made to the PDF version, which is available at <http://www.fakr.noaa.gov/habitat/seis/efheis.htm>.

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mitigating effects would have no demonstrable benefit for EFH of managed species. Indeed, NMFS regulations specifically reserve closures only to address significant adverse impacts.

### III. EFH Protection and Precautionary Principles in the Face of Uncertainty

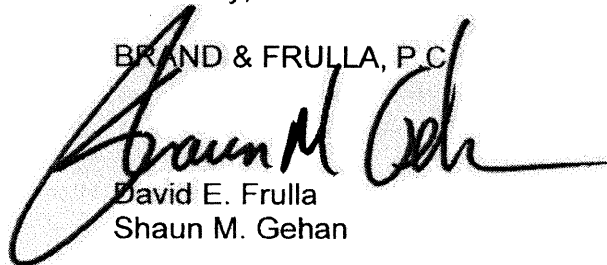
The final overarching issue relates to the different, but perhaps more common, situation in which there exists uncertainty over whether impacts from fishing adversely affect EFH. We address it because it relates to the issue of precautionary measures, which by definition are instituted in the face of incomplete information.

Generally speaking, in the face of an uncertain relationship between fishing activity and habitat impacts no duty exists to impose closures to protect EFH from the adverse effects of fishing gear. It should be noted that just as in the *NRDC* case, discussed at length in the appended letter to former NPFMC Chair David Benton, in every reported case in which we are aware that involved such uncertainty, the courts deciding the issue were faced with situations in which the regulatory response was either to rely on existing management measures for compliance with the EFH provision and/or to require the collection and study of the relationship. The courts in the cases we have reviewed have deferred to the council and NMFS decisions in this regard.

We appreciate the opportunity to submit these comments.

Sincerely,

BRAND & FRULLA, P.C.



David E. Frulla  
Shaun M. Gehan

Counsel for Marine Conservation Alliance

DEF/SMG:mlc  
Enclosure

cc: Ms. Stephanie Madsen, Chair  
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# **ATTACHMENT**

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June 3, 2003

**VIA HAND DELIVERY  
AND FIRST CLASS MAIL**

Mr. David Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4th, Suite 306  
Anchorage, Alaska 99501-2252

**Re: Recent Essential Fish Habitat Court Decisions**

Dear Mr. Benton:

We are writing on behalf of the Marine Conservation Alliance ("MCA")<sup>1</sup> to bring to the Council's attention the United States District Court's decision in *NRDC v. Evans*, --- F.Supp.2d ---, 2003 WL 1702008 (S.D.N.Y. 2003).<sup>2</sup> The case involved national environmental organizations' challenge to the essential fish habitat provisions of the Mid-Atlantic Tilefish Fishery Management Plan.

In briefest summary, United States District Judge Berman held that the Mid-Atlantic Fishery Management Council and NMFS acted according to law in declining to consider measures to reduce the adverse impacts by bottom-tending mobile fishing gear on tilefish essential fish habitat because the record did not show actual evidence of

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<sup>1</sup> MCA members include fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses. The MCA is dedicated to promoting the sustainable use of North Pacific marine resources by present and future generations, based on sound science, prudent management, and a transparent, open public process. The MCA seeks practical solutions to resource use questions that protect both the marine environment and North Pacific fishing communities. The MCA also supports research and public education about the fishery resources of the North Pacific.

<sup>2</sup> This firm represented three commercial fishing associations (National Fisheries Institute – Scientific and Monitoring Committee, Garden State Seafood Association, and Long Island Commercial Fishing Association) who participated as "friends of the court" (*amici curiae*) in that case. These organizations include members and participants who fish with bottom-tending mobile trawl and dredge gear.

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adverse impacts from that gear on tilefish or the habitat on which tilefish depend. Importantly, NMFS, the Mid-Atlantic Council, and the court all concluded that "inferences" that trawl gear could have adverse impacts to tilefish EFH based on otter trawls' alleged adverse impacts in near-shore and inshore areas remote from tilefish EFH did not amount to the "evidence" that the Magnuson-Stevens Act's EFH regime requires to trigger the development and consideration of mitigating measures (and their costs and benefits). We respectfully submit that this case should provide important guidance for other fishery management councils working to comply with the SFA's EFH requirements in the face of limited information about the actual effects of fishing gear on managed species' EFH.

### THE TILEFISH DECISION AND FISHERY

#### A. Development of the Tilefish FMP

Golden tilefish have a close and demonstrated relationship to specific habitat. They are a long-lived and slow-growing fish that create "burrows" in the bottom (usually in clay substrate) along the Atlantic outer continental shelf break (and elsewhere outside the Mid-Atlantic Council's jurisdiction). Successive generations of tilefish can inhabit these burrows for many years. Tilefish need these burrows for breeding and survival. The FMP's EFH provisions thus explained, "Tilefish are clearly shelter-oriented fishes and certain types of sediments (firm clay) in which their burrows can be created and maintained seem essential to tilefish well-being." FMP at 41.

The tilefish fishery is a very discrete one. The directed fishery is currently prosecuted by a handful of longline fishermen home-ported in New Jersey and Long Island. There is a very limited tilefish bycatch in the trawl fishery, and, while the trawl fleet was active in creating the fishery, that fleet's participation has dwindled. FMP at 73-74.

NMFS classified tilefish over-fished in 1998. The Mid-Atlantic Council thereupon developed a tilefish FMP, which was implemented in 2001. Among other things, the FMP developed a rebuilding program that reduced tilefish landings by about 50% to approximately 2 million pounds per year; created a limited access fishery to which most of the quota was allocated, along with a modest open access regime allowing the landing of some bycatch; and defined tilefish EFH.

Mobile gear fisheries, such as bottom-tending otter trawls and mid-water trawls, prosecute other, more valuable fisheries including those for summer flounder and squid, mackerel, and butterfish, in areas ultimately designated as tilefish EFH. Indeed, tilefish EFH comprises some of the most important fishing grounds in the Mid-Atlantic.

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Visual bottom surveys of what became tilefish EFH areas revealed the presence of trawl door marks. However, there exists no evidence that otter trawl gear has any negative impact on the "quality or quantity" of tilefish EFH. The FMP thus explained:

Unquestionably, from submersible vessel research, there are trawl door patterns observed in areas with tilefish burrows, but how much of an impact the doors have and how quickly tilefish can reopen their burrows, if sediment closed, are completely unknown at this time. It is fully recognized that tilefish are extremely important to maintaining habitat around their burrows and this is important for the entire demersal community around these burrows. Any short-term or long-term impacts of bottom tending mobile gear specifically to tilefish habitat are unquantifiable at this time.

FMP at 52.

That said, certain studies have claimed that bottom tending mobile gear has an adverse impact on, for instance, certain fragile, near-shore and inshore habitat areas remote from tilefish EFH, located offshore. FMP at 50.

On this record, the draft tilefish FMP proposed a series of what amounted to bottom-tending mobile gear closed areas to protect tilefish EFH. (While the draft FMP did not contain closure options *per se*, it would only have allowed trawl gear in these areas if it were re-rigged so as not to tend the bottom at all, thereby essentially precluding the Mid-Atlantic bottom and mid-water trawl fisheries.) The draft FMP explained its rationale for developing these options in the following terms:

Based on the best available scientific information, it can be *inferred* that trawling is causing long-term physical adverse impacts to tilefish EFH. It is further implied that in some cases those adverse impacts may be severe, at least locally.

Tilefish Draft FMP, *quoted in NRDC*, 2003 WL 1702008, \*2 (emphasis added).

The draft FMP then went out for public comment. Its EFH provisions received intense scrutiny and comment. Several environmental groups expressed strong support for the need to develop mitigating measures, claiming that it was a valid "precautionary" approach that was particularly warranted given that tilefish were long lived and slow growing. Countervailing comments – from NMFS, its science center, academia, and the industry – focused on the lack of actual evidence pointing to harmful impacts of mobile gear on tilefish EFH, as well as the serious economic consequences on fishermen prosecuting other fisheries in areas of identified Tilefish EFH. *Id.* at \*2-3

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In the end, the Mid-Atlantic Council struck the above-quoted language from the final FMP. In its stead, the council implemented a research approach designed to further study the issue and make recommendations within two years, essentially deferring consideration of any mobile gear closure options. *Id.* at \*3-4.

The Mid-Atlantic Council based its decision on the absence of any data showing adverse impacts on the quality and quantity of tilefish EFH, some indications (including information presented by the leading tilefish scientist in the region) that such habitat was unaffected, and the clear economic impacts associated with closure of these areas to mobile gear. *Id.* at \*2-3. NMFS approved the FMP. The NRDC and Environmental Defense then filed suit challenging the FMP's failure to consider closed areas to protect tilefish EFH from the adverse impacts of bottom tending mobile gear.

### **B. The Holding in NRDC v. Evans**

This suit alleged that NMFS, by approving this plan, violated the EFH provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. § 1853(a)(7); the Administrative Procedure Act, 5 U.S.C. §§ 551-59, 701-06; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370(f) and its implementing regulations. The MSA and APA challenge rested largely on (1) the "inference" in the draft FMP that tilefish EFH was negatively affected by trawl gear, and (2) clear evidence of trawl marks in tilefish EFH areas, which, to the plaintiffs, represented a "per se" indication that tilefish EFH was adversely impacted. The district court rejected both these arguments (as well as others).

The court accepted NMFS' justifications for not considering EFH mitigation measures further. Principally, NMFS successfully claimed that SFA did not require the Council and NMFS to consider EFH mitigation measures if the record did not contain actual evidence of adverse effects (as defined by NMFS regulations implementing the SFA's EFH provisions) by fishing gear on the EFH in question.

In reaching its decision, the court carefully reviewed NMFS's EFH regulations, such as 50 C.F.R. § 600.810(a), defining an "adverse effect" on EFH as "any impact, which reduces quality and/or quantity of [essential fish habitat]."<sup>3</sup> These regulations also require Councils to use the best scientific information, *id.* § 600.815(a)(1)(ii)(B), and

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<sup>3</sup> The CFR goes on to say: "Adverse effects may include direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality and/or quantity of EFH. Adverse effects to EFH may result from actions occurring within EFH or outside of EFH and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions."

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define "identifiable" impacts to be minimized as those "both more than minimal and not temporary in nature." *Id.* § (a)(2)(ii). *NRDC*, 2003 WL 170200F, \*6.

The court then held that there was ample evidence on the record to support a finding that, according to the best scientific information, there exist no identifiable adverse effects on tilefish EFH from bottom-tending mobile gear within the meaning of the law. *Id.* The judge further found that NMFS properly exercised its discretion in finding that studies of gear impacts on EFH of other species was not "sufficiently analogous" to those affecting tilefish habitat. *Id.* In reaching this conclusion, the court cited with approval to the holding by Judge Gladys Kessler of the District of Columbia Federal District Court in *American Oceans Campaign v. Daley*, 183 F. Supp.2d 1, 11-17 (D.D.C. 2000), that "neither the statute nor the regulations requires the Councils to affirmatively conduct research to better identify EFH and the adverse effects of fishing on them, [so] reliance on the best *available* scientific information is sufficient." 183 F.Supp.2d. at 13. *See NRDC*, 2003 WL 1702008, \*6.

As to the argument that the observed trawl door patterns on the sea bed constitute "*per se* evidence of physical disruption," Judge Berman found ample evidence in the record to support the agency's conclusion that, despite such disruption, there was no evidence of any actual reduction in the quantity or quality of tilefish habitat. Included with this evidence were observations that in areas over which there had been significant fishing activity with bottom-tending gear, there existed "active twenty- to thirty-year old tilefish burrows." *NRDC, Id.* at \* 7. In the face of such findings, and despite the fact that tilefish themselves are overfished, the court upheld NMFS's finding that trawl marks alone did not amount to harm to tilefish EFH.

For their part, the environmental groups had argued that it was a likely inference that trawling stirred up sediments that would block access to and from the tilefish burrows, and that the precautionary approach warranted action on this basis. However, the court found there was no evidence of this effect, and thus concluded, "it was reasonable for [NMFS] not to impose new restrictions on bottom-tending gear given the lack of evidence that the gear had an identifiable adverse effect." *Id.* at \*8.

Turning to the contention that the Tilefish FMP's Environmental Impact Statement (required by NEPA) was deficient, the court refused to find that the plan's impact on the environment was not sufficiently considered. The plaintiffs alleged that because the Environmental Protection Agency, in a comment letter, stated that the alternatives "could have been more clearly defined," and because the document stated (accurately) that impacts of fishing on tilefish EFH were not known, the EIS was inadequate because further study was required. The plaintiffs argued that regulations governing EISs require an agency to either "obtain missing information or to include a statement in the [EIS] concerning the relevance and availability of the missing information, where there is incomplete or unavailable information pertaining to adverse impacts." *Id.* at \* 9 (citing 40 C.F.R. § 1502.22).

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The court found, however, that the fact that impacts were unknown was supported by the record, and that the document did describe the available literature regarding trawl gear's effects on habitat impacts on EFH of other species. However, the court accepted as rational the FMP's conclusion that these studies were of little value to understanding impacts on EFH of burrowing species like tilefish. The court finally acknowledged the matter was undergoing further study. *Id.* at \*9.

Finally, the environmental groups criticized the brevity (three pages of analysis) with which the EIS treated the alternatives to no action/further research position adopted under the FMP. They tied their argument to a guidance letter issued by NMFS for revising EISs "deemed incomplete." *Id.* The court found that the Tilefish EIS followed the guidance letter and, more importantly, the legal requirements by discussing in detail the rejected alternative approaches. The EIS "discusse[d] the impacts of adopting these measures, and discusse[d] the difficulty of analyzing effects in the absence of data. It also discusse[d] the need for additional research." *Id.* (administrative record citations omitted). In finding that the EFH analysis met the applicable legal requirements, the court stated that an EIS "is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible." *Id.* at \* 10 (quoting *NRDC v. Calloway*, 524 F.2d 79, 88 (2<sup>d</sup> Cir. 1975)).

## II. ANALYSIS

The tilefish case represents an important precedent for councils nationwide. It sets tangible and coherent limits on a council's obligation under the Sustainable Fisheries Act to protect essential fish habitat from the adverse impacts of fishing gear. Furthermore, the case set these limits even though tilefish are particularly associated with their EFH – the data do show that tilefish rely on their EFH for reproduction and survival. Nonetheless, Judge Berman did not sanction any departure from the statutory and regulatory requirements under the SFA and its implementing regulations that a duty to consider measures to mitigate adverse impacts of fishing gear on EFH arises only upon actual evidence of such adverse impacts.

In other fisheries, such as the North Pacific groundfish fishery, the dependence of stocks on habitat at various stages of life is not well understood, and the science linking these stocks to EFH is even more speculative. However, just as the MAFMC was faced with requests to close tilefish EFH to bottom-tending gear, the NPFMC is confronting similar logic and ensuing requests as the council undertakes to comply with NEPA requirements in connection with development of EFH measures under the SFA, as addressed in the consent agreement in *AOC v. Daley*. And, just as in the tilefish case, the MCA, communities, and various industry groups have made clear that the only

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certain result of implementing such closures is serious economic impacts on the fishing industry and associated fishing-dependant communities.

Under the circumstances facing this Council as it decides how to move forward with measures designed to protect EFH for the various stocks under its authority, the tilefish decision offers two basic guideposts. First, when faced with a situation in which there is no scientific evidence demonstrating that fishing activities are adversely affecting a managed species or its EFH, the Council is under no obligation to impose closures or other mitigation measures. Nor is additional research required as part of any EFH rulemaking. As Judge Kessler has already ruled in the case under which your EFH EIS is being prepared, "reliance on the best available scientific information is sufficient."

Second, a council's obligations to develop proposals to mitigate adverse effects of fishing gear on EFH do not arise from inference, speculation, or surmise. In fact, the imposition of fishery management measures as a "political compromise," unmoored from a scientific basis, violates Magnuson-Stevens Act National Standard Two.<sup>4</sup> Accordingly, a council is not required to act just because an adverse impact may be theorized, such as via the theory that bottom-tending gear may stir-up sediment that could potentially block tilefish burrow access. Nor does evidence of an impact from fishing gear, such as trawl door marks among tilefish EFH, equate to evidence of an adverse impact. (In fact, given the high productivity of the species this Council manages, the inference of no adverse impacts on EFH seems to be the reasonable

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<sup>4</sup> Indeed, a more recent decision than *NRDC* invalidated the tilefish limited access regime because the Tilefish FMP lacked scientific evidence to support its differential restrictions on trawlers' ability to participate in the tilefish fishery, even after rebuilding was accomplished. "While National Standard Two does not compel the use of specific analytic methods or require that an agency gather all possible scientific data before acting, the Standard does prohibit an agency from simply creating a rule based on mere political compromise." *Hadaja, Inc. v. Evans*, --- F. Supp.2d ---, 2003 WL 21190990, \* 7 (D.R.I., May 15, 2003). Furthermore, "[c]onclusory statements regarding the consideration of scientific data are not sufficient -- the FMP must inform its audience of the actual scientific basis supporting it." *Id.* For its part, the U.S. Court of Appeals for the Ninth Circuit, with jurisdiction over Alaska, concluded that, even if a NMFS rule is "eminently fair," National Standard Two requires that it must nonetheless "be founded on science and law, not pure diplomacy." *Midwater Trawlers Cooperative v. Dep't of Commerce*, 282 F.3d 710, 720-21 (9<sup>th</sup> Cir. 2002) (invalidating tribal fishery allocation regime). See also *Hall v. Evans*, 165 F. Supp.2d 114 (D.R.I. 2001) (invalidating differential Atlantic monkfish harvest restrictions for lack of a science-based record rationale); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1047 (N.D. Cal. 1993) (same, for salmon escapement levels).



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"default" position.)<sup>5</sup> Judge Berman explained that even "reasonable inferences" of adverse impacts are not enough to trigger the duty to mitigate impacts under the MSA, even where, as in that case, the Council changed its opinion from the draft to the final FMP and eliminated restrictions on trawling. In fact, if the best scientific information relating to habitat is speculative, no court has required NMFS to impose closures to protect EFH at the expense of the fishing industry.<sup>6</sup>

We understand that, as is the case for tilefish, there is no actual evidence that the fishing gear used in the BSAI/GOA groundfish fisheries adversely affects the "quality and/or quantity" of habitat which is essential to any of the regulated species. Nor is there any information that any of the managed species exhibit signs of habitat degradation. Indeed, we understand that the best available scientific information available in this region does not even make a clear link between the habitat designated as "essential" and the survival of the stocks (as was evident for tilefish), nor does it suggest that trawling impacts lessen the availability of EFH. The tilefish decision expressly found that such hypothetical impacts would not trigger a legal obligation on a council's part to develop and consider EFH mitigation alternatives.

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<sup>5</sup> Judge Berman referenced a finding by Dr. Ken Able, a "recognized expert on tilefish," as providing a reasonable basis for a council to reach just such an inference even where observable trawl patterns were found in tilefish EFH. Dr. Able stated, "These fish survived multiple annual trawling during the most intense time of fishing.... **We can safely postulate that trawling does not impact the local environment or food chain to the detriment of the Tilefish lifecycle.** This is a more reasonable hypothesis than the assumption that trawling does significantly impact the habitat or food chain to the detriment of Tilefish. Our hypothesis of low impact is based upon what we know from trawl surveys and from what has been observed during submersible dives, while the draft plan's assumptions of significant impact on the [essential fish habitat] has no direct evidence or basis other than pure conjecture." *NRDC*, 2003 WL 1702008, \*7 (emphasis in original).

<sup>6</sup> In addition to the tilefish decision, this result has been reached in the following cases: *Conservation Law Foundation v. Daley*, 229 F. Supp.2d 29, 34 (D. Mass. 2002) (finding that the decision not to close groundfish EFH to scalloping lawful where the measure described efforts, such as reductions in time fished, which ameliorated adverse impacts on EFH), *appeal pending*; *Conservation Law Foundation v. Mineta*, 131 F. Supp.2d 19, 27-31 (D.D.C. 2001) (same, stating "Defendants have numerous—and oftentimes competing—statutory objectives to contend with in managing the New England waters; preservation of essential fish habitat is only one of many"); *American Oceans Campaign v. Daley*, 183 F.Supp.2d at 11-17 (finding that the generic EFH amendments of various Councils, including the NPFMC, did not violate the MSA or APA where they identified both measures which lessened impact on EFH and identified information which was lacking, though finding insufficient consideration of alternatives under NEPA).

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Further, even if hypothetical impacts might trigger consideration of mitigating alternatives, there is ample case law support, referred to above, which suggests that measures less than draconian closure options are perfectly acceptable in meeting the requirement that an FMP reduce adverse impacts "to the extent practicable." 16 U.S.C § 1853(a)(7).

In the same vein, we note that NMFS recently approved the EFH provisions of Amendment 13 to the Mid-Atlantic Council's Summer Flounder, Scup, and Black Sea Bass FMP, after having initially disapproved its EFH provisions. In that instance, the Mid-Atlantic Council re-affirmed its recommendation (which NMFS had originally disapproved) not to impose closures in the Mid-Atlantic to protect these regulated species' EFH from the adverse effects of trawl and dredge gear. That council based its decision on its conclusion that such closures would impose significant costs on the fishing industry that outweighed any speculative benefits from such closures.

Turning back to the North Pacific Council, no law **requires** its omnibus Essential Fish Habitat amendment to close fishing areas to protect EFH from any (if any) adverse affects of fishing gear. If actual evidence of adverse impacts on EFH exists (as the tilefish case sets out as a prerequisite for considering mitigating alternatives), the Council must consider a sufficient range of such alternatives. Closures are certainly within the realm of cognizable options under NEPA. That said, however, the council record may very well support a rational conclusion (based on considering the actual costs of further closures versus their speculative benefits), that existing measures which have the effect of reducing tow times, the amount of gear in the water, and other restrictions which lessen the impact of mobile gear on sensitive habitat, already satisfy the Sustainable Fisheries Act's requirement that fishing effects be minimized "to the extent practicable".

Thank you for taking the time to review these comments, and please contact us if we can provide any further information.

Sincerely,



David Frulla



Shaun Gehan  
DEF

DEF/SMG:mlc